BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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| In the Matter of | ) | |
| | ) | File No. WT 99-263 |
| Petition of the Wireless Consumers Alliance, Inc. for a Declaratory Ruling concerning whether the provisions of the Communications Act of 1934, as amended, or the jurisdiction of the Federal Communications Commission thereunder, serve to preempt state courts from awarding monetary relief against commercial mobile radio service ("CMRS") providers (a) for violating state consumer protection laws, prohibiting false advertising and other fraudulent business practices, and/or (b) in the context of contractual disputes and tort actions adjudicated under state contract and tort laws. | ) | DA 99-1458 |



TO: The Federal Communications Commission

**ERIKA LANDIN'S COMMENT TO PETITION FOR DECLARATORY RULING**

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Dated: September 10, 1999

## I. SUMMARY

We are attorneys for Erika Landin ("Landin"), a California resident. We are submitting this comment on the Wireless Consumers Alliance, Inc. ("WCA") petition requesting a Declaratory Ruling on whether the provisions of the Communications Act of 1934, as amended, or the FCC's jurisdiction thereunder, serve to preempt state courts from awarding monetary relief against commercial radio service (CMRS) providers (a) for violating state consumer protection laws prohibiting false advertising and other fraudulent business practices and/or (b) in the context of contractual disputes and tort actions adjudicated under state contract and tort laws.

In 1996, Landin filed a case entitled Landin v. Los Angeles Cellular Telephone Company ("L. A. Cellular") (Case No. BC 143305) pending in the Superior Court of the State of California for the County of Los Angeles. The complaint asserted California state law claims for unfair business practices and false advertising under Sections 17200 and 17500 of the California Business and Professions Code on the ground that L.A. Cellular did not disclose to subscribers its policy of giving dropped call credits. (Copy of Complaint attached as Exhibit 1).[1]

We believe that the declaratory ruling issued by the Commission in response to the WCA petition will have an impact on the relief available in Landin v. L.A. Cellular. In Landin, L.A. Cellular contended that monetary recovery is not available in this type of action. The Court has tentatively agreed with L.A. Cellular and held that plaintiff's claim for restitution/disgorgement is barred by the "filed rate doctrine". (Copy of Court

[1] This submission is being filed by E-mail. With the permission of Susan Kimmel of the FCC, the exhibits relating to this submission are being federal-expressed to the

Opinion attached as Exhibit 2.) The Court also has issued an order staying these proceedings pending resolution of WCA's petition filed with the Commission. (Copy of Court Order attached as Exhibit 3.) We request that the FCC find and declare that cellular phone companies are not endowed with a special status in the marketplace which shields them from consumer fraud laws and that neither the Communications Act nor the FCC's actions preempt state court jurisdiction over L.A. Cellular to award monetary relief for consumer fraud violations. Only in this way will cellular phone companies be thwarted from reaping ill-gotten gains from fraudulent, unfair, and deceptive business practices and consumers be fully protected.

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Commission for delivery on Monday, 9/13/99.

## II. THE FACTS OF THE LANDIN CASE PROVIDE AN EVEN STRONGER REASON NOT TO PREEMPT A STATE COURT FROM ORDERING RESTITUTION FROM CELLULAR PHONE COMPANIES

The facts concerning this case may prove useful for the Commission to understand the importance of the Commission's issuance of a declaratory ruling at this time. This case presents an even stronger reason than the WCA case for the Commission to decline to declare preemption over restitutionary relief awarded by state courts for claims of consumer fraud against cellular telephone companies.

Landin is a resident of Los Angeles County. Defendant is L.A. Cellular, operated as a California general partnership, the general partners of which are two California corporations within the AT&T and Bell South corporate organizations. According to defendant, as of November 13, 1998, L.A. Cellular reorganized and became AB Cellular Holding, LLC, a Delaware limited liability company doing business as L.A. Cellular. As part of the reorganization, L.A. Cellular is now managed by AT&T Wireless Services, Inc.

In this case, Landin's requested relief of restitution is specifically provided for by L.A. Cellular's tariff. For that reason, restitution not only fulfills the objectives of California's consumer fraud laws but also does not contravene the tariff so as to implicate the filed rate doctrine.

### A. L. A. Cellular's Tariff Does Not Adequately Disclose Its Dropped Call Credit Policy

L. A. Cellular defines a "dropped call" as occurring when a cellular customer's call is disconnected without the customer pressing the "END" key or hanging up. Plaintiff's

Statement of Undisputed Fact ("Pl. Statement") 8.[2] Dropped calls are common. Pl. Statement 10. L. A. Cellular's documents reveal approximately five percent of all calls made on L.A. Cellular's system are dropped or at least 2.3 million calls per month. Pl. Statement 50.

L.A. Cellular filed with the PUC its Retail Tariff and Special Conditions Applicable to the Cellular Radio Telecommunications Service and its General Rules Applicable to Cellular Radio Telecommunications Service ("tariff") . (Copy of pertinent portions of tariff attached as Ex. 5) Pl. Statement 1.[3]

Part 6 of Rule 14 of the tariff stated that "[I]n the case of dropped or garbled calls, and on receipt of appropriate proof, the Utility will extend credit to the customer for part or all of the usage charges applicable to the calls in question." Pl. Statement 2. L.A. Cellular added Part 6 of Rule 14 to its tariff by Advice Letter No. 15, which became effective on December 6, 1988. Pl. Statement 3.

Part 8 of Rule 14 states that "[c]laims for credits by non-reseller customers on account of service interruptions or for missed, dropped or garbled calls shall be made within ninety days after the end of the relevant customer's billing cycle in which the interruption or other malfunction is alleged to have occurred." Pl. Statement 5. L.A. Cellular added Part 8 of Rule 14 to its tariff by Advice Letter No. 555, which became effective on January 24, 1995. Pl. Statement 5.

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[2] Filed in support of Landin's Motion for Summary Judgment, attached as Group Exhibit 4. The Court has not ruled on Landin's motion due to the stay.

[3] In December of 1996, the PUC ruled that a cellular service provider no longer need file tariffs but must continue "to maintain a record of its rates, other terms and conditions and revisions thereto at its general office." Re Mobile Telephone Service and Wireless Communications, 174 P.U.R. 4th 543, 552 (Cal. PUC, Dec. 20, 1996).

L.A. Cellular provides a dropped-call credit upon the request of a customer when a customer redials a call within five minutes after that call is dropped. Pl. Statement 6. The amount of the dropped-call credit is the air time cost to the customer of the first minute of the redialed call. Pl. Statement 7.

But the tariff does not adequately disclose L. A. Cellular's dropped call credit policy. The tariff is almost 300 pages of fine print regarding many technical aspects of L. A. Cellular's telecommunications service. Pl. Statement 9. Yet nowhere does the tariff define "dropped call". Pl. Statement 11. Furthermore, there is no way for a customer to know where to find all the provisions that apply to L. A. Cellular's dropped call policy without reading every page of the tariff. Even if a customer did read all of the relevant tariff provisions cited, they do not adequately disclose L. A. Cellular's dropped call credit policy. Pl. Statement of 11-14, 17-19.

L. A. Cellular claims that it disclosed its credit policy regarding dropped calls by the following language in the tariff:

> In the case of *dropped* or garbled *calls*, and on receipt of *appropriate proof*, the utility will extend credit to the customer for *part or all of the usage charges* applicable to the call in question. In the case of credits sought by a certificated reseller. Utility may also require a showing that any credit issued has been or will be passed through to the relevant end user. (Tariff LLAC000054). (Emphasis supplied.)

Thus, since 1988, the tariff has indicated that L. A. Cellular, on "appropriate proof", would issue a credit for "dropped calls". But under the tariff, neither "dropped calls" nor "appropriate proof" are defined. Pl. Statement 11, 12. The tariff also does not indicate that it is the customer's responsibility to seek the credit. Pl. Statement 13. Indeed, L. A. Cellular

does not need customers to identify their dropped calls. Two calls to the same number within five minutes qualify customers to a credit. L. A. Cellular always has this information from the customer's billing statement itself. Pl. Statement of 12.

The tariff also does not explain the meaning of "part or all of the usage charges". Pl. Statement 14. Even L. A. Cellular's Vice President of Customer Care Stephen Fowler ("Fowler") did not know what this phrase means. Id. Thus, customers remain in the dark as to the amount of credit to which they are due.

The tariff also sets forth a time limitation to obtain credits for dropped calls. In 1995, the tariff added this new requirement -- a credit would only be issued if a claim for a credit was made within 90 days after the end of a customer's billing cycle.[4]

> Claims for credits by non-reseller customers on account of service interruptions or for missed, *dropped* or garbled *calls* shall be made within ninety days after the end of the relevant customer's *billing cycle* in which the interruption or other malfunction is alleged to have occurred. *Reseller* customers shall make such claims within 120 days after the end of the relevant billing cycle. (Tariff at LLAC000655). (Emphasis supplied.)

Again, "dropped calls" are not defined; neither is "billing cycle" or "reseller". Pl. Statement 5, 11, 15. The inadequacy of the disclosure is obvious - even Fowler was unaware of this time limitation. Pl. Statement 16.[5]

L. A. Cellular also has claimed that it follows other policies as to dropped calls: (1) L.A. Cellular provides a dropped-call credit upon the request of a customer when a

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[4] The prior provision of the tariff also remained in force.

[5] Fowler testified at his deposition that if there was such a time limitation, he would know about it. Pl. Statement 16.

customer redials a call within five minutes after that call is dropped and the customer has not placed any intermediate calls prior to returning the dropped calls; (2) its credit is the air time cost to the customer of the first minute of the redialed call and (3) L. A. Cellular's Customer Service representatives do not have access to a customer's calling records for any given month until after the end of the billing cycle for that month. (Defendant's Memorandum of Law in Support of Motion for Summary Judgment, p. 5, attached as Ex. 6). None of these policies is disclosed in L. A. Cellular's tariff. Pl. Statement 17-19.

### B. L. A. Cellular Concealed Its Dropped Call Credit Policy From Consumers

As set forth above, the tariff did not adequately disclose L. A. Cellular's dropped call credit policy. In addition, L. A. Cellular had a policy and practice of deliberately refusing to inform customers as to its dropped call credit policy.[6] Dropped calls are not identified anywhere on the monthly bill. Pl. Statement 20. Nor was any L. A. Cellular document defining "dropped calls" ever sent to a customer without the customer first requesting such information. Pl. Statement 22.

While L. A. Cellular's training manual discusses dropped call credits, the training manual is not given to customers. Pl. Statement 21. Nowhere in the L. A. Cellular training manual are employees told to discuss what a dropped call is or how to get a dropped call credit. Pl. Statement 23.

Customer care representatives are trained to discussed dropped call credits only after a customer first requests that specific credit. Pl. Statement 24. When a customer

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[6] In his deposition, Fowler testified about a form letter discussing dropped call credits. But by the terms of the letter, it was sent only after the customer first requested such information. Pl. Statement 36. In fact, Fowler did not know if such letters were

reports that he is experiencing what L. A. Cellular determines is a dropped call, the representative does not necessarily inform the customer of L. A. Cellular's policy for handling dropped call credits, but instead merely states that it could be a geographical or mechanical problem. Pl. Statement 25. There is no evidence that L. A. Cellular provided copies of the tariff to Customer Care representatives-trainees and copies of the tariff are not even maintained in that department. Pl. Statement 26.

L. A. Cellular sent customers a document entitled "How To Read Your Bill", but it did not define "dropped call" or explain how to get a dropped call credit. Pl. Statement 27. On the back of L. A. Cellular's billing statement, L. A. Cellular describes certain "Terms and Conditions", but again, nowhere does it define "dropped call" or explain how to get a dropped call credit. Pl. Statement 28. Customer contract forms produced by L. A. Cellular do not define dropped calls or refer to the fact that customers can get credit for dropped calls. Pl. Statement 29. The extensive information packets and "Welcome Kits" provided to new customers do not define or mention dropped calls or dropped call credits. Pl. Statement 30. Landin attests in her Declaration that she never received notice from L. A. Cellular as to what the term "dropped call" meant or that she could get credit for dropped calls. Pl. Statement 31.

L. A. Cellular claims that customer service tells customers all about dropped call credits. (Fowler Decl. at 5-7, attached as Ex. 7.) However, Fowler did not have personal knowledge as to a number of issues discussed in his declaration. Fowler does not train customer care representatives and is not knowledgeable as to all of the training materials or information provided to them. Pl. Statement 32.

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actually ever sent to customers. Pl. Statement 37.

Fowler did not know the actual number of dropped call credits given to customers, only the number of "courtesy credits", which include all reductions of a customer's bill as a result of a request that the bill was not right or the service did not meet a customer's expectations in some way. Pl. Statement 33. Fowler did not hear what customer service representatives say to customers. Pl. Statement 34. Fowler did not know the length of L. A. Cellular's tariff, could not identify L. A. Cellular's current tariff, and did not know the provisions regarding dropped calls in the current tariff. Pl. Statement 35. Fowler was unaware that there is a 90-day time limitation for requesting credit for dropped calls, and said if there was such a limitation, he would know what it would be.[7] Pl. Statement 16.

L. A. Cellular certainly is capable of providing adequate disclosure of its dropped call credit policy to customers. Prior to 1996, L. A. Cellular charged 50% of its regular service rate for incomplete calls[8] and marked these calls on monthly bills with the letter "I" to the left of the number called. This policy was directly disclosed to customers on the face of their bills. ("Incomplete call 50% of Reg. Serv. Rate"). Pl. Statement 38. As of September 1, 1996, after this lawsuit was filed, L. A. Cellular decided to stop charging for incomplete calls altogether but considered and rejected giving an automatic credit for dropped calls. Pl. Statement 42. L. A. Cellular's change in policy regarding incomplete calls was announced directly on L. A. Cellular's bills: "L. A. Cellular is no longer

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[7] Landin attached to her summary judgment motion only a sample of the marketing documents, contracts and information packets produced by defendant. Landin has found no marketing documents, contracts or information packets in the production that discuss or refer to the dropped-call credit.

[8] L. A. Cellular defines "incomplete calls" as calls that result in a busy signal or no answer or if the customer does not completely dial the number before pressing "send". Pl. Statement 39. To date, L. A. Cellular has not produced documents relating to incomplete calls, and this is a subject about which plaintiff needs to conduct additional

charging for incomplete calls made on and after September 1, 1996. Such calls will no longer appear on your bill." Pl. Statement 43. L. A. Cellular also advertised to its customers that it no longer charged for incomplete calls. Pl. Statement 44. L. A. Cellular knew that customers are confused about the difference between "dropped" and "incomplete" calls. Pl. Statement 45.

In 1993 and again in 1996, L. A. Cellular was considering whether to adopt an automatic dropped call credit system. Pl. Statement 48. As a result of these evaluations, L. A. Cellular knew that the vast majority of dropped calls never resulted in credits. Pl. Statement 49. Defendant's policy for obtaining dropped-call credits requires customers to call defendant's "customer care" department. Pl. Statement 51. Yet the documents reveal that customer care receives only 28,000 calls per month, 336,000 calls per year regarding dropped calls. Assuming each call was about a single dropped call, this represents less than one-and-a-half percent of all dropped calls.[9] Pl. Statement 53.

L.A. Cellular's documents show (and Fowler could not dispute) that approximately 5% of all calls are dropped, or in excess of 2.3 million calls per month. Pl. Statement 50. Other cellular telephone companies, including L. A. Cellular's direct competitor, Air Touch, give automatic dropped call credits, so there is no doubt that the system is feasible from a technological standpoint.[10] See Pl. Statement 46. Recently, L.A. Cellular has come under

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discovery. Pl. Statement 40.

[9] Fowler testified that it was his "opinion" that 80-90% of L. A. Cellular's customers knew how to get dropped call credits but he admitted his opinion was not based on personal knowledge or any computer tracking done through L. A. Cellular. Pl. Statement 55.

[10] In fact, Air Touch advertises this credit directly to customers. Pl. Statement 47.

the management of AT&T Wireless Services, Inc. and claims that it changed its policy so as to bring it "fully in line with other cellular operations [of AT&T Wireless]", by adapting an automatic dropped call credit. (L.A. Cellular Memo re Motion to Continue Trial, at 3, attached as Ex. 8).

According to defendant's own analysis of an automatic system, L.A. Cellular would lose at least $4 million per year in air time revenue by crediting dropped calls automatically.[11] That means L.A. Cellular's customers were losing at least $3 to $4 million per year in dropped-call credits.[12] Pl. Statement 52.

### C. L.A. Cellular's Policy And Practices As To Dropped Call Credits Make It Difficult To Obtain A Credit

Rather than being able to seek a credit for a dropped call at the time of the call, after January 24, 1995, customers had to wait until they received their next billing statement. Pl. Statement 57. The billing statement did not identify dropped calls for customers. Pl. Statement 20. Customers had to remember which of the calls they had made during the last billing period were dropped and then could call defendant to seek a credit.

Documents in defendant's files reveal that L. A. Cellular also suggested tactics to its customer service personnel which would discourage customers from seeking a review of their bills and a full credit. For example, customer care representatives were encouraged to get the few customers who request a dropped call credit to accept a percentage off their

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[11] In 1993 L. A. Cellular had calculated that the automatic dropped call credit would reduce air time revenues by 1%. 1% of L.A. Cellular's revenue for February, 1997, for example, was 1% x $34,612,928 or $346,129 per month or over $4,000,000 for 1997. Pl. Statement 54.

[12] Landin believes the actual figure may be much higher, based on the number of

bill rather than actually figuring out the line-by-line credit for each dropped call. They were trained that the percentage should start low - about 4% - and not disclosed to the customer. Pl. Statement 58. By the terms of the tariff and company policy, whether to even issue a credit for a dropped call was at the discretion of the customer care manager. Pl. Statement 59. If a customer requested a line-by-line review of his or her calls, the customer service agent is instructed to "try to discourage the customer from highlighting and mailing the bills in unless they insist – Negotiate." Pl. Statement 60.

## III. ARGUMENT

### A. Landin's Claim Is Not Barred By The "Filed Tariff" Doctrine

L.A. Cellular claims that Landin's requested relief (i.e., restitution/ disgorgement) is barred by the "filed rate doctrine". But Landin is merely seeking disgorgement for the dropped call credits which were wrongfully withheld by means of L.A. Cellular's unfair business practices. Because dropped calls were provided for in the tariff, Landin is not trying to obtain a rebate in contravention of the tariff, or requiring L.A. Cellular to charge more or less than the filed rate. The U.S. Supreme Court in AT&T v. Central Office Tel., 141 L. Ed. 2d 22 (1998), in discussing the basic contours of the filed rate doctrine, concluded that plaintiff's claims were barred because it "asked for privileges not included in the tariff." Id. at 1964. But in this case, Landin's claims do not seek to alter the tariff in any way.

To state a claim under the California Unfair Business Practices Act ("CUBPA), one need show that members of public are "likely to be deceived." Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1266-67 (1992). In addition, restitution is authorized

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dropped calls which L.A. Cellular customers suffer each year.

under this Act. Bank of the West, 2 Cal. 4th at 1266. Specifically, Section 17203 "authorizes courts to make such orders as 'may be necessary to restore any person in interest any money. . .' which was acquired by practices prohibited by the CUBPA." Id. at 1267. "The purpose of such orders is 'to deter future violations of the [CUBPA] and to foreclose retention by the violator of its ill-gotten gains.'"

As to damages, according to L.A. Cellular's own analysis of an automatic system, L.A. Cellular would lose at least $4 million per year in air time revenue by crediting dropped calls automatically. At the very least, consumers are entitled to restitution in excess of $4 million per year.

At a hearing on L.A. Cellular's motion to strike plaintiff's claim for restitution, the Court tentatively granted L.A. Cellular's motion, stating that ". . . the monetary amount of restoration would be a rebate or refund under Day and would be preempted by the Act."

We believe that Day does not preclude restitution where the filed rate doctrine is not implicated.[13] Landin does not challenge, either directly or indirectly, the reasonableness of the rate contained in the filed tariff. Nor does she seek to benefit from a rate different from that provided by the tariff. Rather, Landin argues that L.A. Cellular committed deceptive advertising by failing to comply with the terms of the tariff and disclose the dropped call credit.

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[13] Landin is also seeking injunctive relief. L.A. Cellular argues, however, that the company is under new management and changed its dropped call policy by providing for automatic credits for dropped calls in March, 1999. L.A. Cellular erroneously argues that this proposed change moots Plaintiff's claim and eliminates the need for a trial.

However, restitution is available even if injunctive relief is not sought or moot. ABC International Traders, Inc. v. Matsushita Electric Corp. of America, 14 Cal. 4th 1247, 1270 (1997). Moreover, injunctive relief is still appropriate since L.A. Cellular may

As the complaint (and indeed as the tariff filed as an exhibit reads) this case is not about whether or not an approved tariff is unlawful or unfair, but whether (a) L.A. Cellular has failed to comply with a filed tariff, and/or (b) L.A. Cellular has misled consumers about its charges in its advertising/notice practices. The purpose of the filed tariff doctrine is not to interfere in the specialized jurisdiction of the regulatory agency which considers appropriate rate levels (*e.g.* charges which are calculated to achieve a "fair rate of return" on invested rate base capital).

One of the purposes of §17200 is to make certain that other laws are complied with - including agency pronouncements - by all competitors. The law recognizes that more than one avenue to enforcement is needed - one cannot rely on regulators to set standards and to necessarily accomplish complete enforcement of the standards they adopt. This is why even the violation of Federal Trade Commission cease and desist orders covering the *same* ground of misleading advertising, or a violation of any current rule of any existing agency, where conferring a competitive advantage can be an unlawful act in competition invoking §17200 enforcement in in California.[14]

In summary, the private attorney general authorization of the Unfair Competition Act is designed to allow multiple paths to the courthouse door where one competitor may violate a law to its competitive advantage. One cannot always count on a regulator, or even on competitors to sue. The former has limited resources and enforcement options and the latter may choose to join in the offense - may have to join in it to stay in business

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reverse its policy in the future.

[14] Apart from very narrow exceptions not applicable here, virtually any state, federal, or local law can serve as a predicate for an action under Bus. & Profs. Code § 17200. See

- precluding their reliable role as enforcer. This rationale helps to explain the section's prohibition of "unfair *or unlawful*" acts in competition; the addition of "unlawful" by amendment was conscious. It extended the California nomenclature beyond the simply "unfair" delineation of its federal counterpart - §5 of the Federal Trade Commission Act.[15]

Consistent with the supplemental track to redress intended for the Unfair Competition Act is §17534.5: "Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to thee remedies or penalties available under all other laws of this state."

LA Cellular's position that money "damages" are unavailable does not apply to "restitution," a different concept. In the latter, money is taken from the defendant to avoid unjust enrichment and to restore (to the extent feasible) what was taken from those who lost. That principle is basic to the equity jurisdiction upon which this statute relies. A court in equity must be able to put the parties back where they were before the unfair or wrong was committed.

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*Podolsky, et al. v. First HealthCare Corporation* (1996) 50 Cal.App.4th 632 (1996).

[15] See discussion in Fellmeth and Papageorge, *California White Collar Crime*, (Lexis, 1997), at 2-33 to 2-34: "In particular, the purpose of the "unlawful" practice provision is 'to extend the meaning of unfair competition to anything that can properly be called a business practice and that at the same time is forbidden by law." (Quoting the leading case interpreting § 17200, *Barquis v. Merchant Collection Association of Oakland* 7 Cal.3d 94, 113 (1972). The *Barquis* holding has since been reaffirmed numerous times, most recently in *Stop Youth Addiction, Inc. v. Lucky Stores* 17 Cal.4th 1254, 1266; see also *Saunders v. Superior Court* 27 Cal.App.4th 832 (1994) holding that unlawful practices' prohibited by §17200 cover any practices forbidden by law, be it civil, criminal, federal, state, or municipal, statutory or court-made; it is not necessary that predicate law provide for civil enforcement.

But the rationale behind broad equity authority "to set things right" here has additional public policy implications in the context of continuing competition between businesses given the the Unfair Competition Act 's purposes. The principle of disgorgement is basic to the Unfair Competition Act's viability. Imagine a statutory scheme where there is an injunction but no disgorgement. The only remedy available is a prospective order to "go and sin no more," with perhaps some remedy (such as civil penalties or contempt) if *that* order is violated. Now imagine you are a competitor and an unfair act (*e.g.*, misleading advertising) will give you an economic advantage over your competitor. What is your upside? Greater market share. What is your down side? In such a regime, nothing - not until there is a suit and an injunction entered. Meanwhile, you keep all you have gained from your violation. In such a circumstance, the law becomes not a force for fair competition, but the opposite, immunity from sanction until or unless a case is filed and an injunction entered. It becomes an assurance that you will "keep the take" until forewarned - with a forewarning process that itself can takes years to finalize.

### B. Consumer Fraud Claims, Such As For False Advertising, Should Not Be Preempted

L.A. Cellular claims that Landin's complaint is preempted by Section 332(c) (3) (A) of the Federal Communications Act. The overwhelming weight of authority holds that claims under a state consumer fraud and deceptive practices act are not preempted by the Communications Act. See e.g., Tenore v. AT&T Wireless Servs., 962 P.2d 104 (1998) cert. denied, _____ U.S. _____, 119 S.Ct. 1096 (1999); Esquivel v. Southwestern Bell Mobile Systems, 920 F.Supp.713 (S.D. Tex. 1996); Heichman v. AT&T, 943 F.

Supp. 1212 (C.D. Cal. 1995); Kellerman v. MCI Telecommunications Corp., 112 Ill. 2d 428, 493 N.E. 2d 1045, 98 Ill. Dec. 24,cert. denied, 479 U.S. 949 (1986); Bruss Co. v. Allnet Communications Services, Inc., 606 F. Supp. 401 (N.D. Ill.1985); Weinberg v. Sprint Corporation, 165 F.R.D. 431, 439(D.N.J. 1996); Castellanos v. U.S. Long Distance Corp., 928 F.Supp.753 (N.D. Ill. 1996).

Section 332(3) (c)(A) of the Communications Act expressly preserves the right of states to regulate the terms and conditions of commercial mobile services, such as the deceptive marketing and billing practices which are the essence of plaintiff's complaint here:

> ...No State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. (Emphasis supplied.)

Whether federal law preempts state law "fundamentally is a question of Congressional intent..." English v. General Electric Co., 496 U.S. 72 (1990). Accord, Mangini v. R.J. Reynolds Tobacco Co., 7 Cal. 4th 1057, 1066, 31 Cal. Rptr. 2d 358, 875 P.2d 73 (1994), cert. denied, 130 L. Ed. 2d 493, 115 S. Ct.577(1994).

As the court in Esquivel v. Southwestern Bell MobileSystems, 920 F. Supp. 713, 716 (S.D. Tex. 1996) pointed out, the Congressional history of Section 332(c) (3) clearly indicates that the phrase "terms and conditions" was specifically meant to include the matters at issue in this case: customer billing information, practices in billing disputes, and consumer protection matters. The legislative history on Section 332(c) (3) provides as follows:

Section 332(c) (3) provides that state or local governments cannot impose

> rate orentry regulation on private land mobile service or commercial mobile services; this paragraph further stipulates that nothing here shall preclude a state from regulating the other terms and conditions of commercial mobile services. It is the intent of the Committee that the state still would be able to regulate the terms and conditions of these services. By "terms and conditions" the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities citing issues (e.g., zoning); transfers of control; the bundling of services and equipment; and requiring that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions" H.Rep. No. 111, 103rd Cong., 1st Sess., Cec.5205t at p. 260 (1993), reprinted in 1993U.S.C.C.A.N. 588. (Emphasis supplied).

The Federal Communications Act also has indicated in Section 414 a desire to allow states to continue to protect consumers: "Nothing in this chapter contained shall in any abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. Section 414.

L.A. Cellular claims that this "savings clause" does not apply here because Landin's state law claims purportedly are in direct conflict with the express preemption clause in Section 332(c) (3) (A)

On the contrary, according to language of the statute and its legislative history, the issues regarding L.A. Cellular's deceptive manner of failing to disclose its dropped calls policy is carved out and *protected* from preemption by the Federal Communications Act. To find that a federal law conflicts with state law, the conflict must arise when compliance with both federal and state regulations is a physical impossibility", Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). Neither conditions are present here. Nothing in Landin's complaint (or the WCA petition) attempts to regulate L.A. Cellular's rates.

Indeed, state consumer fraud claims are intentionally preserved by the Federal Communications Act, which intended to leave to the states the right to prevent the very practices plaintiff alleges here --fraudulent billing practices. Landin is not seeking to adjudicate the reasonableness of L.A. Cellular's charges for dropped calls; she is alleging that L.A. Cellular's utter failure to tell its customers how to obtain a dropped call credit or even what a dropped call was constitutes a deceptive or unfair practice.

Esquivel, supra, supports Landin's position in this case. There, plaintiff brought a consumer fraud action relating to the defendant's practice of assessing liquidated damages if a customer terminated service before the expiration of the agreed term. The court found that the issue relating to liquidated damages was a customer billing or other consumer protection matter dispute not preempted by the Communications Act, and remanded to state court. Although the court in dictum says that if a claim questioned the regulatory rates charged by a commercial mobile service, this would be a preemptive factor that could be asserted as a defense in state court (920 F. Supp. at 714), the consumer protection matter at issue related to the "terms and conditions" of defendant's services, not its rates.

Similarly, the claims in the Landin case do not question L.A. Cellular's rates for service; they are for consumer fraud in connection with defendant's failure to disclose its dropped call credit policy. Landin is alleging that she is entitled to full and fair disclosure as to how to obtain credit for dropped calls and that the procedure should not be unfairly

onerous.

Weinberg v. Sprint Corporation, 165 F.R.D. 431 (D.N.J. 1996) also supports Landin's claims. Sprint promoted its rate of 10 cents per minute for telephone calls. Plaintiff alleged deceptive and misleading advertising and promotional practices involving Sprint's practice of "rounding up" (in other words, charging more than10 cents per minute for any call which did not last precisely one minute). Even though the claim related to rates, the court held that it was not preempted by the Federal Communications Act because it involved "disclosure of those rates and damages for the alleged failure to disclose their calculation" and "resolution of the suit does not depend upon the 'reasonableness of Sprint's billing rates'...but upon the reasonableness of Sprint's business practices in conducting its advertising campaign." 165 F.R.D. at 435. The court went on to say: "Further, no issue of federal law must be decided in order to adjudicate[plaintiff's] suit. That the trial court may find it necessary to refer to Sprint's published billing rates under the Communications Act does not transform the complaint into one presenting a federal question as essential to recovery." Id.

In discussing its holding that the claims were not preempted, the court also rejected L.A. Cellular's argument that Section 207 of the Communications Act provides a federal private right of action:

> The suit does not challenge Sprint's provision of services or its tariff rates, nor does it dispute the calculation of those rates. Instead, plaintiff's state law claims relate to Sprint's advertising practices. Sections 201, 202, and 203 of the Communications Act impose no duty on common carriers to make accurate and authentic representations in their promotional practices, and, therefore, Section 207 provides no remedy for a deviation from such conduct. (Citing Boyle v. MTV Networks, Inc., 766 F. Supp. 809, 816(N.D. Cal. 1991).) Accordingly, the Court finds that the act's civil enforcement provision does not provide a remedy through which a

customer may recover for a common carrier's failure to disclose a business practice. 165 F.R.D. at 437.

Because the action related to statements made by Sprint in advertising promotions, the court noted that "the conduct at issue is neither regulated by the Communications Act nor dependent upon Sprint's status as a regulated long distance carrier." 165 F.R.D. at 439. The court, therefore, held that:... "It lacks the authority to re-characterize plaintiff's claims as exclusively federal because the Communications Act does not contain a civil enforcement provision' within the scope of which the plaintiff's state claim[s] fall." (Citation omitted). 165 F.R.D. at 439.

Wegoland, Ltd. v. NYNEX, Corp., 806 F. Supp. 1112 (S.D.N.Y.1992), aff'd 27 F.3d 17 (2d Cir. 1994), which has been cited by L.A. Cellular, is inapposite. There, ratepayers sued NYNEX and other telephone companies and subsidiaries for fraud. The basis of the claims was that defendants gave regulatory agencies and consumers misleading financial information to justify their inflated rates. The court held that because the complaint asked it to determine the reasonableness of rates that were intended to be regulated by ratemaking agencies, the action was preempted.

In the case at bar, the FCC has chosen not to regulate the rates of cellular services, leaving them up to competitive market conditions. U.S.C. Section 332(c) (1) (c) . Furthermore, Landin's claims relate to whether L.A. Cellular's failure to disclose that a credit can be obtained for dropped calls and onerous procedures for obtaining a credit unfairly prevent customers from obtaining such credits. A court does not need to determine the amount of the credit or L.A. Cellular's commercial rates for service to adjudicate Landin's claims.

A recent case in the area of preemption involving the application of Section 17200 of the Unfair Practices Act, issued by the California Supreme Court is Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Company, 83 Cal. Rptr. 2d 548 (April 8, 1999).

In Cel-Tech, a familiar argument was made: that the alleged "below cost" pricing practices of L.A. Cellular were not subject to Section 17200 because they were preempted by the state Public Utility Commission's authority over rate setting. The California Supreme Court rejected this argument on basic policy grounds similarly applicable to L.A. Cellular here.

In Cel-Tech, sellers of cellular telephones sued L.A. Cellular, which also sold cellular telephones, challenging L.A. Cellular's practice of selling telephones below-cost as violative of the Unfair Practices Act and unfair competition statute. Amici curiae had suggested that the action might infringe on the regulatory authority of the Public Utilities Commission ("PUC"). The court below invited the PUC to file an amicus curiae brief addressing this question. That brief concluded that it was unlikely that the action would interfere with the PUC's regulatory responsibilities. After considering the matter itself, the California Supreme Court agreed.

The PUC noted that the "court, not the [PUC], has jurisdiction to determine violations of antitrust laws," and that "[i]f an entity violates below-cost pricing law . . ., it is subject to the usual consequences for such violations. We note that while we would, of course, review a below-cost allegation brought before us in an appropriate proceeding, we are certainly not the primary enforcer of below-cost pricing law." (Citation omitted) 83 Cal. App. 2d at 555.

Thus, Cel-Tech holds that courts are the primary enforcers of violations of the Unfair Trade Practices Act whether or not the PUC (or the FCC, for that matter) also has jurisdiction to determine such violations.

Cel-Tech is directly relevant to this case, which also deals with the Unfair Trade Practices Act. Under Cel-Tech, plaintiff's claims that L.A. Cellular violated the tariff and engaged in false advertising are not preempted.

### C. The Commission's Premption Over Cable Service Should Not Be Extended To Cellular Telephone Companies

The Commission has held that it has preemptive jurisdiction over cable services. The reasons for that preemption are completely absent in state consumer fraud actions against cellular telephone companies. In terms of telecommunications jurisdiction generally, 47 USC Section 556 is entitled "Preemption and Local Authority," and reads in relevant part:

> "(a) Regulation by States, political subdivisions, State and local agencies, and franchising authorities. Nothing in this subchapter shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter.
>
> (b) State jurisdiction with regard to cable services. Nothing in this subchapter shall be construed to restrict a State from exercising jurisdiction with regard to cable services consistent with this subchapter." [[47 USC § 556; see also City of Dallas v. FCC, 165 F.3d 341, 347 (5th Cir. 1999) discussing Congressional intent not to interfere with local franchising authority.]

With this underlying FCC statutory limitation in telecommunications, what statutory authority grants to the agency exclusive occupation of the field over cellular transmission?

It is well settled law that federal preemption requires either such a clear expression of Congressional intent to preempt (or to occupy a field exclusively, see e.g., Jones v. Rath Packing Co., 430 US 519 (1977)) , or preemption must be implied through statutory structure and clear intent (as when the Congress creates a comprehensive regulatory scheme requiring uniformity, or when federal statutory compliance necessarily contradicts state law). See Fidelity Federal Savings & Loan Ass'n v. De La Cuesta, 458 US 141, 153 (1982).

The question is whether such necessarily implied preemption applies here. The major case interpreting De La Cuesta, is City of New York v. FCC, 486 U.S. 57 (1988). Although such implication was found in the case of City of New York, the extraordinary circumstances and details of that court's decision make plain its inapplicability as to comprehensive cellular regulation preemption. In City of New York, the U.S. Supreme Court was dealing with conflicting federal and local technical standards for the transmission of cable television signals. The Court found clear Congressional authority under section 624(e) of the Cable Communications Policy Act of 1984 to expressly preempt state and local technical standards governing the quality of cable television transmission. The Court noted the previous ten year history of FCC preemption of such standards before the enactment of the 1984 Cable Act and the latter's affirmation of that preemption authority (City of New York, supra at 66-69). Throughout its discussion of this implied preemptive power, the Court takes pains to tie it narrowly and specifically to the technical standards in transmission issue. [ E.g., "When Congress enacted the Cable Act in 1984, it acted against a background of federal pre-emption *on this particular issue*." (emphasis added, City of New York at 66)]

To arrogate to itself preemptive jurisdiction over state law pertaining to consumer fraud and false advertising, the Commission would here have to do it where: (1) there is no such statutory command or mission; (2) application of state law against which Commission regulatory authority would be superimposed, does not necessarily conflict with it, and the Commission does not have any realistic mechanism to deal with the disputes and issues which would be federally captured; (3) because of the above, there is no record of prior preemptive jurisdiction as in City of New York and no record of Congressional approval of the same—critical to implied preemption; (4) there is no comprehensive regulatory structure necessarily undermined by licensee compliance with local standards pertaining to fair and honest business practice, standards which every business, regulated and unregulated, must meet. In other words, no explicit preemption occupation of the field exists, as must be conceded. And no element cited in City of New York to justify implied preemption would apply here. Crucially, not only are all of them not present in Landin or WCA, *none* of them are present.

## IV. CONCLUSION

For the reasons set forth above, Landin respectfully requests that the FCC rule as follows:

A. That neither the Communications Act nor the FCC's jurisdiction thereunder serve to preempt a state court from awarding monetary relief against cellular telephone companies for the violation of state laws concerning false advertising and other fraudulent business practices;

B. That the "filed rate" (or "filed tariff") doctrine does not preclude a state court's ability to award monetary relief against cellular telephone companies for consumer fraud; and

C. For any other ruling that the Commission determines would be just and reasonable in connection with the issues raised herein and/or in light of the circumstances surrounding the WCA's petition or otherwise.

Dated: September 10, 1999

Respectfully Submitted,

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**DECLARATION OF SERVICE BY EMAIL AND MAIL**

I, the undersigned declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Cook, over the age of 18 years, and not a party or interested in the within action; that declarant's business address is 200 North LaSalle Street, Suite 2100, Chicago, Illinois 60601.

2. That on September 10, 1999, declarant served LANDIN'S COMMENT TO PETITION FOR DECLARATORY RULING by Email and also by depositing a true copy thereof in a United States mailbox at Chicago, Illinois in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 10th day of September, 1999, at Chicago, Illinois.

Mary Jane Edelstein Fait